Supreme Court, U.S.
FILED
JUL 29 1992
OFFICE OF THE CLERK

NO. 92-13

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

CHARLES L. GRIMES,

Petitioner,

v.

JOHN P. MCCARTHY PROFIT SHARING PLAN,
VITALINK COMMUNICATIONS CORPORATION,
LESLIE DENEND AND NETWORK SYSTEMS CORPORATION,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

Brief In Opposition To Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

Steven J. Rothschild
(Counsel of Record)
Randolph K. Herndon
Matthew F. Boyer
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899
(302) 651-3000
Attorneys for Respondents
Vitalink Communications
Corporation,
Leslie Denend and Network
Systems Corporation

Joseph A. Rosenthal
ROSENTHAL, MONHAIT,
GROSS & GODDESS
First Federal Plaza
P.O. Box 1070
Wilmington, Delaware 19899
(302) 656-4433
Attorneys for Respondent
John P. McCarthy Profit
Sharing Plan

DATED: July 29, 1992

QUESTIONS PRESENTED

1. Where a shareholder admittedly fails to raise any Federal due process claim in objecting to a proposed settlement of a class action in a state trial court, and fails on appeal to ask the state supreme court to allow him to introduce such a claim, do two generic references in his appeal briefs to "due process" and "constitutional requirements," without any analysis, establish this Court's jurisdiction to review a claim that the state courts never addressed?

2. Where a state court provides a shareholder who objects to a class action settlement with all due process protections, carefully considers his contentions, and finds that the record was sufficiently developed to warrant approval of the settlement, and where the shareholder fails to initiate any discovery as permitted under state law to develop his claims more fully, can the shareholder raise an important Federal due process question worthy of this Court's consideration?

LIST OF PARENT COMPANIES AND NON-WHOLLY-OWNED SUBSIDIARIES

Respondent Network Systems Corporation has no parent company and no non-wholly-owned subsidiaries.

Respondent Vitalink Communications Corporation has Network Systems Corporation as its parent company and no non-wholly-owned subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARENT COMPANIES AND NON-WHOLLY-OWNED SUBSIDIARIES	ii
TABLE OF CONTENTS	iii
TABLE OF CASES AND AUTHORITIES	iv
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTION	2
SUMMARY OF ARGUMENT	2
STATEMENT OF THE CASE	3
1. The Parties	3
2. The Vitalink Shareholders Challenge The Merger Agreement	4
3. Discovery Shows That The Claims Are Without Merit	4
4. The Proposed Settlement And Notice To The Class	6
5. Petitioner Raises Only State Law Claims	6
6. The Court Of Chancery Fully Considers Petitioner's Claims	8
7. Petitioner Fails To Raise A Federal Claim In His Appeal To The Delaware Supreme Court	10
REASONS FOR DENYING THE WRIT	11
A. Petitioner Has Failed To Satisfy This Court's Jurisdictional Requirement	12
B. The Petition Does Not Raise An Important Question Of Federal Due Process	15
1. The Delaware Courts Provided Petitioner With All Due Process Protections And Thoroughly Considered His Objections	15
2. Petitioner Failed To Avail Himself Of All Process Accorded Him	19
CONCLUSION	21

TABLE OF CASES AND AUTHORITIES

	PAGE
CASES	
Abramson v. Pennswood Investment Corp., 392 F.2d 759 (2d Cir. 1968)	18
Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971)	19
Bailey v. Anderson, 326 U.S. 203 (1945)	12
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	12
Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977)	16
County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990)	19
Equitable Trust Co. v. Gallagher, 77 A.2d 548 (Del. 1950)	13
Gates v. Illinois, 462 U.S. 213 (1983)	12
Geller v. Tabas, 462 A.2d 1078 (Del. 1983)	15
Hansberry v. Lee, 311 U.S. 32 (1940)	15
In re Amsted Indus. Litig., 521 A.2d 1104 (Del. Ch. 1986)	3, 16, 17, 20
In re Corrugated Container Antitrust Litig., 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982)	19
In re Real Estate Title & Settlement Services Litig., 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989)	14
Kahn v. Occidental Petroleum Corp., C.A. No. 10808, 1989 Del. Ch. LEXIS 92 (Del. Ch. July 19, 1989)	17
Maher v. Zapata, 714 F.2d 436 (5th Cir. 1983)	15
Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991)	18

	PAGE
Pennsylvania R.R. v. Illinois Brick Co., 297 U.S. 447 (1936)	13, 14
Peterson v. Hall, 421 A.2d 1350 (Del. 1980)	13
Polk v. Good, 507 A.2d 531 (Del. 1986)	16
Robert M. Bass Group, Inc. v. Evans, C.A. No. 9953, 1989 Del. Ch. LEXIS 154 (Del. Ch. Nov. 16, 1989)	18
Smith v. Allegheny Corp., 394 F.2d 381 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968)	15
Street v. New York, 394 U.S. 576 (1969)	12
Webb v. Webb, 451 U.S. 493 (1981)	12, 14
Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983)	19
Yee v. City of Escondido, ____ U.S. ____, 112 S. Ct. 1522 (1992)	12
AUTHORITIES	
28 U.S.C. §1257	2, 12
Federal Rules of Civil Procedure 23	15, 16
Delaware Supreme Court Rule 8	10, 13
Delaware Supreme Court Rule 14(c)	14
Chancery Court Rule 23	16
Chancery Court Rule 59	13
7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1765 (1986)	16
Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974)	16

NO. 91-468

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES L. GRIMES,

Petitioner,

v.

JOHN P. MCCARTHY PROFIT SHARING PLAN,
VITALINK COMMUNICATIONS CORPORATION,
LESLIE DENEND AND NETWORK SYSTEMS CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

OPINIONS AND JUDGMENTS BELOW

This petition arises out of an Order and Final Judgment of the Delaware Court of Chancery dated November 15, 1991 (the "Delaware Judgment") approving the settlement (the "Settlement") of a consolidated class action captioned *In re Vitalink Communications Corporation Shareholders Litigation,* Consolidated C.A. No. 12085 (Del. Ch.) (the "Delaware Action"). The Delaware Judgment and related 39-page Memorandum Opinion of the Delaware Court of Chancery are unreported, but are reproduced at Appendix D and Appendix C, respectively, to the

Petition for a Writ of Certiorari to the Supreme Court of Delaware (the "Petition"). The order of the Supreme Court of Delaware affirming the Order and Final Judgment is included as Appendix A to the Petition.[1]

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. §1257 because the Federal claim that Petitioner now presents was neither raised in nor passed on by the Delaware courts. (See infra, pp. 12-15)

SUMMARY OF ARGUMENT

Petitioner claims that he presents an important question of Federal due process concerning the procedural requirements that a state court must observe in considering a proposed settlement of a class action. However, Petitioner does not identify any procedure that he was denied or any other new procedure that due process requires. Instead, at bottom, he simply disagrees with the carefully articulated opinion of the Delaware Court of Chancery, affirmed on appeal, that the record was sufficiently developed to support the conclusion that the proposed settlement was fair and reasonable under Delaware law.

This Court should refuse to grant the Petition for two reasons:

First, Petitioner fails to show that this Court has appellate jurisdiction because his Federal due process claim was neither raised in nor decided by the Delaware courts. As Petitioner concedes, he failed to present any due process claim, Federal or State, in the Delaware Court of Chancery, relying instead solely on State law. On appeal to the Delaware Supreme Court, Petitioner never raised a Federal due process issue or attempted to

---

[1] References to the Petition are cited hereinafter as "P ___"; references to Petitioner's appendix are cited as "P ___ a"; and references to the appendix attached hereto are cited as "R ___ a."

explain why this issue should be considered notwithstanding the court's rule barring claims not presented in the trial court. Nor did the court address such a claim. Now, Petitioner attempts to establish this Court's jurisdiction on the basis of two generic references to "due process" and "constitutional requirements," without any analysis or discussion, in his appellate briefs. Given his failure to raise this Federal claim properly and adequately, Petitioner cannot establish this Court's jurisdiction to consider such a claim.

Second, even if Petitioner had considered his Federal due process claim important enough to raise in Delaware, the claim would present no question worthy of review by this Court. Delaware Court of Chancery Rule 23, which mirrors its Federal counterpart, provided Petitioner with well-recognized due process protections. After providing Petitioner with a full opportunity to be heard, the Delaware Court of Chancery, in a meticulous, 39-page opinion, carefully assessed his contentions. The court properly found that the record was sufficiently developed to enable it to conclude that the claims raised were "very weak," the settlement was "fair and reasonable," and the plaintiffs' counsel's services were "expeditious and effective."

To the extent that Petitioner now contends that the record should have been more fully developed to test the adequacy of the representation that the class received, he has only himself to blame. Delaware law provided Petitioner with an opportunity to initiate discovery into matters bearing on the good faith and competency of class counsel and the merits of the settlement. *See, e.g., In re Amsted Indus. Litig.,* 521 A.2d 1104, 1108 (Del. Ch. 1986). Petitioner failed to take advantage of these opportunities. Consequently, Petitioner cannot present an important question of Federal due process worthy of this Court's consideration.

STATEMENT OF THE CASE

1. The Parties.

Petitioner Charles L. Grimes was a former shareholder of Vitalink Communications Corporation ("Vitalink") and member of a class certified in the Delaware Action. Petitioner objected to the Settlement in the Delaware Action in his individual capacity and as trustee of the "Gadfly Foundation, Inc."

The individual respondent was a member of the board of directors of Vitalink (the "Board") at all times relevant to this action. Respondent John P. McCarthy Profit Sharing Plan was a named plaintiff and a class representative in the Delaware Action. Respondent Vitalink was acquired by respondent Network Systems Corporation ("NSC") in 1991.

2. The Vitalink Shareholders Challenge The Merger Agreement.

This action was brought in early May 1991 on behalf of the former public shareholders of Vitalink challenging a merger agreement (the "Merger Agreement") providing for a tender offer (the "Offer") by and a second step merger with a wholly owned subsidiary of NSC (the "Merger"). (P 10a) Shortly after the announcement of the Merger Agreement, seven Vitalink shareholders filed suits: four in Delaware and three in California. The plaintiffs in these actions alleged that the members of the Board breached their fiduciary duties owed to Vitalink's shareholders and that NSC aided and abetted the Board in these breaches. (P 10a) The Delaware actions were consolidated on May 28, 1991. (P 63a)

3. Discovery Shows That The Claims Are Without Merit.

During May 1991, the parties in the Delaware Action engaged in expedited discovery in connection with a motion by the Delaware plaintiffs to enjoin preliminarily the consummation of the Offer in June 1991. (P 63a) Discovery included the review of tens of thousands of pages of documents from Vitalink, NSC, and their financial advisors. In addition, the plaintiffs took

the depositions of: two of the four members of Vitalink's Board, its chairman and CEO and an experienced, non-management director; a representative of the financial advisor to Vitalink, Kidder Peabody & Co., Inc. ("Kidder Peabody"); the chairman of NSC's board of directors; and a representative of NSC's financial advisor. (P 63a-64a)

The record showed that the plaintiffs' claims were meritless. (*E.g.*, P 38a) The plaintiffs learned that the four members of the Vitalink Board, three of whom were outside directors, were "completely disinterested." (P 17a) The plaintiffs also learned that the Board entered into the Merger Agreement only after carefully considering Vitalink's bleak prospects and its strategic alternatives. (P 27a, 31a)

In fact, Vitalink, a high-technology company that had become a leader in the telecommunications industry in the late 1980s, was in sharp decline in early 1990 due to the obsolescence of its product line. Vitalink's stock tumbled from $17 to $11 per share in February 1990. (P 11a) In response to this sharp decline, Vitalink engaged Kidder Peabody in February 1990 to help it respond to industry changes, including exploring the feasibility of combining with other companies. (P 11a)

In late 1990 and early 1991, Vitalink began arm's-length discussions with NSC relating to possible business arrangements.[2] (P 12a) Vitalink also contacted other companies thought to be the most technologically compatible in order to improve its competitive position. (P 12a-13a) By April 1991, after the Board concluded that it was not realistic to expect another company to express interest in Vitalink, Vitalink and NSC focused their attention on the possibility of a business combination. (P 13a) In the meantime, Vitalink's earnings plummeted and its stock price fell to a low of $5 5/8.

The Vitalink Board negotiated vigorously with NSC. (P 14a) The Board, acting with the advice of Kidder Peabody,

---

[2] Before the Merger, NSC neither held stock nor had any other financial interest in Vitalink.

rejected NSC's first two bids. Ultimately, the Board accepted NSC's final offer to purchase all Vitalink common stock for $10.50 per share. This per share price, made a part of the Merger Agreement executed on May 6, 1991, represented a 23.5% premium over Vitalink's recent stock market price. (P 14a) The Merger Agreement also contained a "fiduciary-out" clause permitting Vitalink to accept another, higher bid if one should appear. (P 28a-29a)

Finally, the plaintiffs reviewed Vitalink's and NSC's disclosure documents in light of the discovery taken. The plaintiffs concluded that the defendants had disclosed all material facts.

4. The Proposed Settlement And Notice To The Class.

After the plaintiffs had engaged in discovery and had an opportunity to more fully evaluate their prospects of success, the parties negotiated a Settlement in which the defendants agreed to (i) extend the Offer for ten days, (ii) limit the cancellation amount payable to NSC pursuant to a Stock Option Agreement entered into by NSC and Vitalink in conjunction with the Merger Agreement, (iii) put a cap on NSC's right, under the Merger Agreement, to reimbursement of fees and expenses and (iv) promptly disclose the Settlement. (P 14a-15a) These provisions provided any potential bidder for Vitalink with additional time to make a bid and encouraged such a bid by making it less expensive. (P 37a-38a, 39a-40a) The terms of the Settlement were publicly announced on June 14, 1991, over three months prior to the hearing on the Settlement. (P 81a)

Pursuant to well-established procedures, the Court of Chancery entered an order on July 18, 1991 (i) certifying a class of Vitalink shareholders for the purpose of the Settlement and (ii) approving the notice of the proposed Settlement, which advised class members of the September 16, 1991 scheduled date of the settlement hearing and the right of class members to object and appear at the hearing. (P 3a-7a) The court-approved notice was mailed to the members of the class on July 29, 1991. (P 10a) Thus, Petitioner had ample time to investigate the Settlement.

5. Petitioner Raises Only State Law Claims.

Petitioner took advantage of some, but not all, of the procedures in the Court of Chancery designed to protect absent class members. He reviewed documents produced in discovery, submitted an opening memorandum of law in support of his objection and a reply letter to the parties' memoranda, and presented oral argument, through counsel, at the two-hour settlement hearing on September 16.[3] However, Petitioner did not avail himself of his opportunity under Delaware law to initiate formal discovery relating to the good faith of the class counsel or any other issue.

Petitioner principally argued that the settlement should not be approved because the underlying claims were meritorious and were being compromised without benefit to the class. (P 38a) He did not contend that the Vitalink directors breached their duty of loyalty and good faith toward the company's shareholders. (P 17a) However, he did claim that the directors breached their duty of care by failing to canvass the market adequately or otherwise obtain a reliable body of evidence before concluding that the Offer was the best transaction available. He also claimed that the directors breached their duty of candor by failing to disclose material facts relating to the Offer. Finally, Petitioner claimed that the benefits achieved through the Settlement were "illusory" because it was unlikely that any third party would come forward with a bid that exceeded the Offer.

As a fall-back argument, Petitioner also asserted that the record was not sufficiently developed under Delaware law for the court to weigh the strengths and weaknesses of the action.

---

[3] Petitioner implies that the Vice Chancellor was not diligent because he announced at the opening of the settlement hearing that he had "not yet had a chance to read the papers in opposition to the settlement," mainly because of a problem with getting the documents transmitted to him at his chambers in Georgetown, Delaware. (P 8; P 98a) This problem apparently arose because Petitioner filed his opening memorandum on September 6 at the court's offices in Wilmington, Delaware, but failed to send a courtesy copy of the papers to the Vice Chancellor's chambers in Georgetown. Also, his reply letter was filed just two hours before the hearing.

In the Court of Chancery, Petitioner did not challenge the plaintiffs' counsel's application for fees. Indeed, at oral argument, Petitioner's counsel remarked as to the fee application:

> While I'm on that point, let me say one thing, Your Honor. Often these settlements, the plaintiffs' fees get cut. *We take no position on that.* If you want to do that, that's certainly up to you.

(R 1a) (emphasis added) Nor did Petitioner object to the class certification.

More significantly, and as Petitioner concedes, he raised no issue of Federal due process. (P 13 n.8)

6. The Court Of Chancery Fully Considers Petitioner's Claims.

On November 8, 1991, six weeks after the settlement hearing, the Court of Chancery issued a 39-page memorandum opinion evaluating the proposed settlement. This opinion is a model of careful scrutiny, far from the "rubber stamp" that Petitioner portrays it to be. After methodically considering each of Petitioner's contentions, the court concluded that the claims were extremely weak and that the record was sufficiently developed to warrant approval of the settlement as fair and reasonable. (P 38a)

Applying well-recognized legal standards, the court exercised its independent judgment in weighing the value of the claims against the value of the Settlement Agreement. (P 16a-17a) First, the court analyzed Petitioner's assertion that the Settlement would foreclose strong claims. The court determined that the Board satisfied its duty of care in that it obtained a reasonable body of evidence supporting its decision to enter into the Merger Agreement. (P 17a-31a) In reaching this conclusion, the court noted, among other things, (a) the Board's reliance on the advice of Kidder Peabody (P 22a-27a, 30a), (b) the Board's arm's-length negotiations with NSC, which resulted in Vitalink shareholders obtaining a 23.5% premium for their stock (P 27a-28a, 30a), (c) the belief of the Board and Kidder Peabody

that no other entity was interested in bidding (P 28a, 30a) and (d) the 45-day market test during which no third party even inquired as to making a competing bid. (P 28a, 30a)

The court also found that, under Delaware law, the purported nondisclosures were not material or misleading. (P 31a-36a) Overall, the court concluded that the plaintiffs' claims were "very weak." (P 38a)

The court then thoroughly analyzed Petitioner's argument that the benefits were not sufficient to support the Settlement. The court found that the Settlement provisions (i) acted to enhance Vitalink's market check, (ii) added to the Board's body of reliable evidence and (iii) provided certainty to any potential bidder as to how much a successful bid for Vitalink would cost. (P 37a-40a) The court concluded that these benefits were of sufficient value to support the settlement of the claims. (P 38a)[4]

Finally, the court evaluated the plaintiffs' application for attorneys' fees and expenses. The court found that the fee request was reasonable considering the contingent nature of the fee, the quality of legal services, the standing and ability of counsel and public policy considerations. (P 40a-41a) The court also found that the plaintiffs' counsel adequately responded to a question regarding Petitioner's claim that he had failed to respond to correspondence.[5] Overall, the court concluded that the services provided by class counsel were "expeditious and effective." (P 40a)

---

[4] The benefits were "speculative," as the Court recognized, in the sense that they provided an enhanced market check but did not guarantee the appearance of a higher bidder. That no other bidder appeared after this enhanced market check further confirmed the Vitalink directors' judgment that they had obtained the best available transaction.

[5] Plaintiffs' counsel, Mr. Squitieri, explained to the court that he referred Petitioner's counsel to Arthur Abbey, lead partner in the Abbey & Ellis firm, not just "somebody else in the office," as Petitioner states. (P 10; P 102a) This reference made perfect sense since, as Mr. Squitieri explained, Petitioner's questions primarily concerned the settlement negotiations that Mr. Abbey had conducted on behalf of the plaintiffs. (P 102a)

Finally, because none was raised, the Court of Chancery did not pass on any Federal due process claim.

7. Petitioner Fails To Raise A Federal Claim In His Appeal To The Delaware Supreme Court.

In his appeal to the Delaware Supreme Court, Petitioner raised solely the same Delaware law issues that he had briefed and argued before the Court of Chancery. Petitioner claimed that the record did not support the finding of the Court of Chancery that (i) the Vitalink directors properly exercised their fiduciary duties in concluding that the NSC offer was the best deal possible, (ii) the Vitalink directors disclosed all material facts and (iii) the record was adequately developed. (R 4a; *see also* R 2a-3a, 5a-6a) He failed to introduce any Federal due process claim.

As Petitioner concedes, any proper attempt to introduce a Federal due process issue for the first time on appeal would have been governed by Delaware Supreme Court Rule 8.[6] (P 13 n.8) However, Petitioner failed to ask the Delaware Supreme Court to consider any new claim pursuant to Rule 8.

Nowhere in Petitioner's appellate briefs or oral argument did he present for the court's decision a Federal due process claim. On page 34 of his 35-page opening brief, Petitioner referred to "due process rights," without even specifying whether the reference was to state or Federal rights. (P 103a) Similarly, on page 19 of his 20-page reply brief, he referred to "constitutional requirements," followed by a bare citation to a Third Circuit case. (P 104a) Petitioner offered no discussion or analysis of any specific Federal constitutional requirement nor did he ask the Delaware Supreme Court to rule on any particular

---

[6] Delaware Supreme Court Rule 8 states:

Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

Federal issue. At oral argument, Petitioner's counsel never mentioned "due process" or "constitutional requirements" at all.[7]

After considering the briefs and oral argument, the Delaware Supreme Court affirmed the Delaware Judgment on the basis of the well-reasoned Memorandum Opinion of the Court of Chancery. The Delaware Supreme Court did not decide any Federal due process claim.

REASONS FOR DENYING THE WRIT

Petitioner contends that this Court should consider what he regards as an important Federal due process question concerning the adequacy of the representation of the class and the *bona fides* of the Settlement. His request should be denied for two independent reasons. First, Petitioner has not properly invoked this Court's jurisdiction because he failed to present adequately the Federal due process question in the Delaware courts. Second, even if Petitioner's new-found Federal claim had been adequately presented in the Delaware courts, such claim does not raise any valid due process concern. The Delaware courts provided Petitioner with all well-recognized due process protections, carefully considered his contentions, and properly found that the record was sufficiently developed to warrant approval of the Settlement. Moreover, in light of his own failure to take advantage of the discovery rights that the Delaware courts provided him, Petitioner's claim is not worthy of this Court's consideration.

---

[7] At oral argument, Petitioner confirmed that his contention was that the Court of Chancery erred in finding that the breach of fiduciary duty claims were weak:

> [Court]: So succinctly, your argument is that the Vice Chancellor said your claims didn't have substantial merit, when in fact they did, and that's where he erred in approving a settlement that was inadequate, because the merit of the claims that were being compromised was much stronger?
>
> [Petitioner's Counsel]: That's correct, Your Honor. . . .

(R 7a)

A. Petitioner Has Failed To Satisfy This Court's Jurisdictional Requirement.

The Petition should be denied because Petitioner has failed to satisfy this Court's jurisdictional requirement that the Federal claim be "raised or addressed" in the state courts. *Yee v. City of Escondido,* ___ U.S. ___, 112 S. Ct. 1522, 1531 (1992); *Gates v. Illinois,* 462 U.S. 213, 218-20 (1983); *see also* 28 U.S.C. §1257.[8] This Court has repeatedly stated that it has no jurisdiction unless "the record as a whole shows either expressly or by clear implication that the federal claim was *adequately presented* in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981) (emphasis added); *see also Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71 (1988) (vague appeal to constitutional principles does not preserve a Federal claim in the state courts for review by the Supreme Court). Where, as here, the highest state court has failed to pass upon a Federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York,* 394 U.S. 576, 582 (1969); *see, e.g., Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945).

The requirement that claims be adequately and properly presented in the state courts serves at least two salutary purposes that are applicable here. First, " 'due regard for the appropriate relationship of this Court to state courts' . . . demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials. . . . " *Gates,* 462 U.S. at 221 (quoting *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-35 (1940)). Likewise, "'[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind.'" *Gates,* 462 U.S. at 221 (quoting *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969)).

---

[8] The Court has expressed different views as to whether, in cases arising from state courts, this rule is jurisdictional or prudential. *E.g., Yee,* 112 S. Ct. at 1531. In non-criminal cases such as this, the rule has been held to be jurisdictional. *See Gates,* 462 U.S. at 222.

Petitioner concedes that he never gave the Delaware Court of Chancery an opportunity to consider whether its approval of the Settlement violated his Federal due process rights. Attempting to excuse this failure, he argues that the issue of adequate representation was somehow "enlarged" to constitutional dimensions by the alleged failure of that court to examine his contention that the settlement was a "sham." (P 13-14 n.8) This makeshift argument fails for three separate reasons.

First, Petitioner's claim that the court ignored his "sham" argument is incredible. The court considered this argument by carefully weighing, among other things, the merits of the claims and the value of the benefits conferred.[9] (*Supra,* pp. 8-9) Further, Petitioner fails to show why he could not have pressed every aspect of his claim concerning the adequacy of the class representative and the purported "sham" settlement in the Court of Chancery. Finally, even assuming that the alleged due process issue arose out of the court's opinion, Petitioner offers no explanation why he failed to seek reconsideration of the Delaware Judgment under Court of Chancery Rule 59(e).

Petitioner's failure to raise this claim in the Court of Chancery barred him from introducing the claim on appeal. Delaware Supreme Court Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented," with a limited exception where "the interests of justice so require. . . . " *See* Delaware Supreme Court Rule 8; *Peterson v. Hall*, 421 A.2d 1350, 1354 (Del. 1980); *Equitable Trust Co. v. Gallagher,* 77 A.2d 548, 550 (Del. 1950). Petitioner did not attempt to invoke this narrow exception. Having failed to request that the Delaware Supreme Court apply this exception, Petitioner cannot fairly invoke it as a means to gain access to this Court. *See Pennsylvania R.R. v. Illinois Brick Co.,* 297 U.S. 447, 463 (1936) ("[a]s the highest court of the state declined to consider [petitioner's two constitutional claims] because not raised in the [trial] court or presented

---

[9] Of course, the mere fact that the court did not employ Petitioner's pejorative term "sham" does not mean that it failed to consider the substance of his claims. (*See* P 36a-37a)

to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them").

Even if he could have raised his due process claim on appeal to the Delaware Supreme Court, Petitioner failed to "adequately present" such a claim. *Webb,* 451 U.S. at 496-97. In any proper attempt to inject a Federal issue into the case, Petitioner would have addressed not only Rule 8, as noted above, but would have discussed the issue in the opening brief he filed with the Delaware Supreme Court. Petitioner's generic reference to "due process," buried at the end of his 35-page opening brief, is patently insufficient as a basis for this Court's jurisdiction since it fails even to specify whether the source of the right is the State or Federal Constitution. *E.g., Webb,* 451 U.S. at 501 ("there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim").

The single reference to "constitutional requirements" at the end of Petitioner's reply brief in the Delaware Supreme Court is also inadequate. Petitioner failed to offer any discussion or analysis, or request that the Court rule on a matter of Federal due process. *E.g., Webb, supra.* Nor could Petitioner inject a Federal due process issue in his reply brief by citing, without discussion, a Third Circuit case.[10] *See* Del. Supreme Court Rule 14(c) ("[a]ppellant shall not reserve material for reply brief which should have been included in a full and fair opening brief"). Further, Petitioner did not even raise the due process issue at oral argument and, on the contrary, confirmed that his appeal dealt with the substantive Delaware law issue regarding the sufficiency of the benefits as a basis for compromising the plaintiffs' claim. *See supra,* n. 7. Viewing the record "as a whole,"

---

[10] The case cited did not even address the claims that Petitioner now raises. *Compare In re Real Estate Title & Settlement Services Litig.,* 869 F.2d 760, 769 (3d Cir.), *cert. denied,* 493 U.S. 821 (1989).

Petitioner's two cryptic references to "due process" and "constitutional requirements" did not adequately present a Federal due process issue to the Delaware Supreme Court. *Webb, supra.*

For all the foregoing reasons, Petitioner's attempt to invoke the jurisdiction of this Court should be rejected, and his Petition should be denied.

B. The Petition Does Not Raise An Important Question Of Federal Due Process.

Even if Petitioner had raised his Federal due process claim in the Delaware Action, the Petition fails to present an important Federal question worthy of review by this Court. The Delaware courts provided Petitioner all well-recognized procedures, thoroughly considered his objections, and found the record sufficiently developed to warrant approval of the Settlement. One of the rights that the Delaware courts provided him was the opportunity to initiate discovery to challenge the adequacy of the class representative and the *bona fides* of the Settlement. Petitioner failed to exercise this right. Thus, Petitioner cannot raise a Federal due process claim by complaining that the record should have been more fully developed.

1. The Delaware Courts Provided Petitioner With All Due Process Protections And Thoroughly Considered His Objections.

The requirements of procedural due process in the context of a settlement of a class action are well-settled. *See, e.g., Hansberry v. Lee,* 311 U.S. 32 (1940); Federal Rule of Civil Procedure 23. Due process requires that shareholders receive (a) adequate notice of the proposed settlement, (b) adequate representation of their interests at settlement hearings and (c) an opportunity to participate and be heard with respect to the settlement. *Smith v. Allegheny Corp.*, 394 F.2d 381, 391 (2d Cir.), *cert. denied,* 393 U.S. 939 (1968); *Maher v. Zapata,* 714 F.2d 436, 450-53 (5th Cir. 1983); *Geller v. Tabas*, 462 A.2d 1078, 1083 (Del. 1983). Under Rule 23 of the Federal Rules of Civil Procedure, which "sets [ ] out a procedure carefully designed to satisfy

the due process requirements established by *Hansberry*," Note, *Collateral Attack on the Binding Effect of Class Action Judgments,* 87 Harv. L. Rev. 589, 592 (1974), courts have developed a substantial body of law concerning the adequacy of representation of the class, *e.g.*, 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1765 (1986), and, in particular, the adequacy of class counsel as a representative. *Id.* at §1769.1.

Delaware Court of Chancery Rule 23 mirrors its Federal counterpart and thus provides the same due process protections. As an additional safeguard, the Court of Chancery exercises its own business judgment on the fairness and reasonableness of the proposal.[11] *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986). Delaware courts recognize that these procedures are intended, in part, "to protect against any temptation that a class representative or his attorney may feel to settle class claims for less than the maximum then achievable. . . . " *See, e.g., In re Amsted Indus. Litig.*, 521 A.2d 1104, 1107-08 (Del. Ch. 1986). As the Court explained:

> An abuse of the litigation-settlement process cannot be tolerated and this Court must closely scrutinize any proposed settlement which appears to be unfair, not only to the stockholders on whose behalf the suits are allegedly brought, but also other parties or counsel. This Court, as a Court of Equity, has a special historical mandate to prevent unconscionable conduct on the part of any litigant or his counsel. See, H. STRINGFELLOW, *Who Comes into Equity Must Come With Clean Hands,* (1 Ala. Law. 248, 1940).

---

[11] In exercising that judgment, a court "must do so on less than complete information. Otherwise, the goal of encouraging the good faith compromise and settling of disputes short of a full trial would be defeated." *Amsted,* 521 A.2d at 1107. *See also Cotton v. Hinton,* 559 F.2d 1326, 1332 (5th Cir. 1977).

Kahn v. Occidental Petroleum Corp., C.A. No. 10808, 1989 Del. Ch. LEXIS 92, at *8-9 (Del. Ch. July 19, 1989) (citing *Amsted, supra*).

Because of its concerns regarding the potential for abuse, the Court of Chancery provides discovery to objectors "to test the good faith of the class representative. . . . " *Amsted*, 521 A.2d at 1108 (emphasis added). An objector may obtain discovery concerning "how negotiations came about, how they proceeded, and when various elements of the proposal (including attorneys fees) were agreed upon and why. . . . " *Id.* Similarly, under certain circumstances, an objector will be permitted to take further discovery on the merits of the claims and defenses. *Id.* at 1108-09.[12]

Here, Petitioner was provided all of these procedural safeguards and is unable to point to any procedure that he was denied. Instead, he now attempts to transform his disagreement with the decision of the Court of Chancery into a Federal due process claim by resorting to the typical lament of a disappointed litigant that the court failed to make "any inquiry" or "even . . . examine" his contentions. (P 2, 13 n.8) Specifically, Petitioner maintains that the court ignored the following "clues suggesting a sham transaction" (P 16):

(1) the plaintiffs' purported modest discovery (P 9, 10, 17);

(2) the plaintiffs' purported failure to respond to a letter requesting information (P 10, 17);

(3) facts relating to the plaintiffs' application for fees and expenses (P 16-17);

---

[12] Petitioner cannot create an important Federal question simply by citing articles discussing the potential for abuse of the class action settlement process. (P 15) As demonstrated above, the Delaware courts not only recognize this potential for abuse and factor it into their deliberations; they also provide objectors with an opportunity to initiate discovery to investigate whether such abuse has occurred.

(4) the releases provided in the Settlement (P 16-17); and

(5) the timing of the class certification. (P 16)

This argument ignores the Court of Chancery's well-reasoned opinion. As to the first contention, the Vice Chancellor expressly found the "record to be sufficiently developed so as to afford a reasonable basis to respond to all of the asserted claims." (P 38a) With respect to the second contention, the Court specifically found that the plaintiffs' attorneys had adequately responded to questions raised by Petitioner. (P 40a)

Petitioner never raised the last three issues in either of the Delaware courts. In fact, Petitioner expressly informed the Court of Chancery that he would take "no position" on the plaintiffs' application for fees and expenses and did not alter this position on his appeal to the Delaware Supreme Court. (R 1a) Despite the lack of objection, the Court of Chancery considered the plaintiffs' attorneys' services, found them to be "expeditious and effective," and concluded that the fee request was "reasonable."[13] (P 40a-41a)

Similarly, Petitioner remained silent on the scope of releases provided in the Settlement.[14] Indeed, such releases are generally included in settlement agreements to assure that all claims are put to rest under the Settlement. *See, e.g., Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991); *Abramson v. Pennswood Investment Corp.*, 392 F.2d 759, 762 (2d Cir. 1968). Given the nature of the releases, the Delaware courts had no reason to question them.

---

[13] Petitioner suggests that the award of fees, if calculated on an hourly basis, totalling $500 is unreasonable. However, given the contingency nature of the fee arrangement and nature of the work, such an amount is reasonable. *See Robert M. Bass Group, Inc. v. Evans*, C.A. No. 9953, 1989 Del. Ch. LEXIS 154 (Del. Ch. Nov. 16, 1989) (reducing fee application so that hourly rate would be approximately $500 per hour).

[14] Although Petitioner argued that the record was insufficiently developed to justify the releases provided in the Settlement, he did not question, as he now does, the scope of the releases.

Likewise, Petitioner failed to object to the negotiation of the Settlement before the class was certified in Delaware. A class need not be certified before a settlement is negotiated. *See, e.g., Weinberger v. Kendrick,* 698 F.2d 61, 72-73 (2d Cir. 1982), *cert. denied,* 464 U.S. 818 (1983); *County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1323 (2d Cir. 1990).[15] Here, given the expedited nature of the action and the weakness of the case, the plaintiffs had no practical alternative but to attempt to settle the action sooner rather than later, before notice was given. The Offer was scheduled to close in early June. In order to obtain an additional market check for the class, the plaintiffs were required to negotiate and obtain the best deal before the Offer closed. Thus, the timing of the class certification posed no bar to the Settlement.

In sum, the Court of Chancery provided Petitioner with all due process protections, fully considered his contentions, and properly exercised its judgment in concluding that the record was sufficiently developed to warrant approval of the Settlement. Several of the claims that Petitioner now raises were not even pressed before the Delaware courts. Petitioner has thus failed to identify why this case presents an important question of Federal due process worthy of this Court's consideration.

2. Petitioner Failed To Avail Himself Of All Process Accorded Him.

Petitioner also fails to raise an important Federal due process question because he did not even take advantage of the rights granted him by the Delaware courts to inquire further into

---

[15] *Cf. Ace Heating & Plumbing Co. v. Crane Co.,* 453 F.2d 30, 33 (3d Cir. 1971) (although highly desirable to designate a class representative before settlement negotiations, record showed that class was adequately represented in spite of settlement being reached prior to court designation of a class representative). Here, as discussed above, the Court of Chancery conducted a thorough inquiry into the Settlement and concluded it to be fair. *See also In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 223 (5th Cir. 1981), *cert. denied,* 456 U.S. 998 (1982) (Rule 23 does not proscribe combined notice of class action and a proposed settlement).

the adequacy of the representation of the class and the *bona fides* of the Settlement.

Under *Amsted,* Petitioner could have initiated formal discovery into every aspect of the Settlement negotiations. Further, he could have sought discovery on the merits of the claims and defenses. Such discovery could have included depositions of the class representatives and counsel for the parties, interrogatories and document requests. Although he had at least six weeks' notice of the settlement hearing in which to initiate this discovery, Petitioner elected not to pursue any of these rights. Thus, Petitioner is particularly ill-equipped to contend that the Delaware courts failed to meet "minimal procedural requirements" under the Fourteenth Amendment. (P (i))

In an apparent attempt to shift the Court's focus from his own lack of diligence, Petitioner contends that his "clues," many of which he presents for the first time in this Court, required the Court of Chancery to develop a further evidentiary record regarding the adequacy of class counsel. (P 18-19) However, as discussed above, the Court of Chancery in fact considered the class counsel's investigation of the case, his conduct, and the fruits of his efforts in light of the weakness of the claims. The court properly found that counsel's services were "expeditious and effective" (P 40a), and that the record was sufficiently developed to warrant approval of the Settlement. Petitioner cannot transform his disagreement with the conclusions of the Court of Chancery on matters of state law, affirmed by the Delaware Supreme Court, into a Federal due process case worthy of this Court's consideration.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

Steven J. Rothschild
(Counsel of Record)
Randolph K. Herndon
Matthew F. Boyer
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899
(302) 651-3000
Attorneys for Respondents
Vitalink Communications,
Leslie Denend and
Network Systems
Corporation

Joseph A. Rosenthal
ROSENTHAL, MONHAIT,
GROSS & GODDESS
First Federal Plaza
P.O. Box 1070
Wilmington, Delaware 19899
(302) 656-4433
Attorneys for Respondent
John P. McCarthy Profit
Sharing Plan

DATED: Wilmington, Delaware
July 29, 1992

APPENDIX

APPENDIX A

Excerpts From Transcript of "Settlement Hearing And Request For Attorneys' Fees" Held In The Court Of Chancery Of The State Of Delaware

[Tr. 67] MR. CHRISTOPHER: . . . So Your Honor, there is no benefit here for this class. While I'm on that point, let me say one thing, Your Honor. Often these settlements, the plaintiffs' fees get cut. We take no position on that. If you want to do that, that's certainly up to you. . . .

APPENDIX B

Table Of Contents From "Opening Brief of Appellants - Objectors Below" Filed With The Supreme Court Of The State Of Delaware

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
STATEMENT OF THE NATURE OF THE PROCEEDINGS AND THE ORDER SOUGHT TO BE REVIEWED	1
SUMMARY OF ARGUMENT	2
STATEMENT OF FACTS	3
A. Introduction	3
B. The Parties	3
C. The Board's Activities In Early 1990	4
D. Kidder Immediately Recommends A Sale Of Vitalink	5
E. Vitalink Hires Leslie Denend	7
F. Kidder Persists In Its Efforts To Sell Vitalink	8
G. NSC Offers To Purchase Vitalink	14
H. The Litigation And The Settlement Agreement	17
ARGUMENT	19
I. THE CHANCERY COURT MISAPPLIED IMPORTANT LEGAL PRINCIPLES IN ASSESSING THE STRENGTH OF PLAINTIFFS' CLAIMS RELATING TO THE DUTIES OF THE DIRECTORS IN SELLING THE COMPANY	19
A. Standard And Scope Of Review	19

PAGE

TABLE OF CONTENTS (Continued)

B. The Vitalink Board's Duty Was To Attain The Best Available Alternative, Not Simply A Transaction That A Banker Would Label "Fair" 19

C. The Board Did Not Have A "Reliable Body Of Evidence" Sufficient To Determine Whether It Had Attained The Best Available Transaction 21

II. THE CHANCERY COURT MISAPPLIED SETTLED LEGAL PRINCIPLES IN ASSESSING THE MERITS OF PLAINTIFFS' DUTY OF CANDOR CLAIMS 28

A. Standard And Scope Of Review 28

B. The Lower Court Impermissibly Weighed The Quality Of The Valuation Analyses Omitted From The Disclosures 28

III. THIS SETTLEMENT APPROVAL CANNOT BE UPHELD ON THE PRESENT RECORD . 32

A. Standard And Scope Of Review 32

B. The Nominal Settlement Benefits Cannot Support Dismissal Of The Claims 32

CONCLUSION 35

APPENDIX C

Summary Of Argument From "Opening Brief Of Appellants - Objectors Below" Filed With The Supreme Court Of The State Of Delaware

SUMMARY OF ARGUMENT

I. When a board of directors of a Delaware corporation agrees to sell the company, the board has an enhanced duty to obtain the best available transaction, not just a transaction and price which an investment banker will label "fair". The directors breach their fiduciary duties when the sell the company without canvassing the market and without a reliable body of evidence demonstrating that the transaction accepted is the best available alternative.

II. When a board of directors relies on an investment banker's fairness opinion and analyses in recommending to the shareholders that they accept an offer to purchase the company, the board must disclose all facts surrounding the banker's financial analyses, not simply the facts or analyses supportive of the conclusion reflected in the "fairness" opinion. The Court of Chancery may not weigh the persuasiveness of the omitted information; rather, the shareholders are entitled to make that decision.

III. The Court of Chancery erred by misapplying settled legal precepts in weighing the strength of the claims to be foreclosed by the proposed settlement. The illusory consideration offered in the settlement cannot serve as a basis for terminating the substantial claims asserted. Further, the representatives of the shareholder class presented the Court with an insufficient record on which to approve the settlement.

APPENDIX D

Table Of Contents From "Reply Brief Of Appellants - Objectors Below" Filed With The Supreme Court Of The State of Delaware

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
STATEMENT OF FACTS	1
A. Vitalink's Financial And Competitive Position In 1990 And 1991.	1
B. The Board's Failure To Conduct A Market Check.	5
C. The NSC Offer.	6
ARGUMENT	8
I. THE BOARD LACKED THE EXCEPTIONAL BODY OF RELIABLE EVIDENCE NECESSARY TO APPROVE THE SALE OF THE COMPANY	8
A. Scope and Standard Of Review.	8
B. The Board Lacked A Reliable Body Of Evidence Under Delaware Law.	8
1. The "Implicit Market Test"	9
2. The NSC Negotiations	11
3. The Board's Belief That No Bids Would Be Forthcoming	12
4. Other "Factors"	12
II. OBJECTORS' DUTY OF CANDOR CLAIMS ARE VERY STRONG AND SHOULD PROCEED	15
A. Standard And Scope Of Review.	15

PAGE

TABLE OF CONTENTS (Continued)

B. The Lower Court Erroneously Engaged In A Qualitative Review Of The Disclosure Violations 15

III. JUDICIAL VALIDATION OF THIS SETTLEMENT SHOULD NOT BE PERMITTED 18

A. Scope And Standard Of Review. 18

B. This Settlement Does Not Warrant Approval 18

CONCLUSION 20

APPENDIX E

Excerpts From Transcript of Oral Argument Before the Supreme Court of Delaware

[Tr. 22] JUSTICE HOLLAND: So succinctly, your argument is that the Vice Chancellor said your claims didn't have substantial merit, when in fact they did, and that's where he erred in approving a settlement that was inadequate, because the merit of the claims that were being compromised was much stronger?

MR. CHRISTOPHER: That's correct, Your [Tr. 23] Honor. I think if this were a case such as Resorts, where there was a dispute as to the strength of the claims, but you also had a 60 some percent increase in the tender offer price as a result of the settlement — I think this would be a much harder case, certainly. There is room for error there, because there is so much consideration supporting the settlement.

In this case, the consideration settlement is so nominal that if these claims are any stronger than what the Vice Chancellor computed, I think that his whole analysis is flawed and should be reconsidered, and that's why I don't think the abuse of discretion standard is a major impediment on this case.